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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 581

In the Matter

of

The Petition of COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO for exemption from or limitation of its liability as owner of the steamship MANDU.

GREAT AMERICAN INSURANCE COMPANY,
Petitioner.

PETITION OF GREAT AMERICAN INSURANCE COMPANY FOR WRIT OF CERTIORARI.

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Great American Insurance Company.

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GREAT AMERICAN INSURANCE COMPANY, Petitioner.

PETITION OF GREAT AMERICAN INSURANCE COMPANY FOR WRIT OF CERTIORARI.

Petitioner, Great American Insurance Company, prays for a writ of certiorari to be issued to review a decision of the Circuit Court of Appeals for the Second Circuit modifying the decree of the District Court for the Eastern District of New York.

JURISDICTION.

Jurisdiction is based on Section 240-a of the Judicial Code as amended (28 U. S. C., Sec. 347 [a]).

OPINIONS BELOW.

The latest opinion of the Circuit Court of Appeals (R. 2204) is reported at 114 F. (2d) 361. A petition for

rehearing was denied without opinion on August 19, 1940 (R. 2209). The previous opinion of the Circuit Court of Appeals (R. 738a) is reported as *The Mandu*, 102 F. (2d) 459.

The first opinion by the District Court (E. D. N. Y.), overruling petitioner's exceptions to the amended petition for limitation of liability (R. 210-218), is reported 15 F. Supp. 627. The subsequent opinions of the District Court dismissing the claims in the limitation proceeding and allowing the owner of the MANDU to withdraw its petition for limitation of liability (R. 500; 632-642) are reported 20 F. Supp. 820, and 21 F. Supp. 372. These decisions were reversed by the Circuit Court of Appeals in *The Mandu*, 102 F. (2d) 459. Following the trial on the merits, the District Court wrote an opinion (R. 2160-71), 1939 A. M. C. 1313, not officially reported. The District Court also made extensive findings of fact (R. 2173-84) holding both vessels equally at fault for the collision and awarding petitioner herein a recovery from the owner of the MANDU of 50% of the cargo loss on the DENDERAH, which was later reduced by the Circuit Court of Appeals to 20% in its opinion reported at 114 F. (2d) 361. The order for mandate was entered in the office of the Clerk of the Circuit Court of Appeals on August 21st, 1940 (R. 2211).

STATEMENT.

This cause involves a collision between the steamships MANDU and DENDERAH in the entrance to the harbor of Santos, Brazil, on July 31, 1929. As a result of the collision the DENDERAH was sunk and became a total loss, and a great portion of her cargo was either lost, sustained serious damage, or was charged with heavy general average contributions.

PROCEEDINGS BELOW.

Companhia de Navegacao Lloyd Brasileiro, as owner of the MANDU, filed a petition for limitation of its liability under Rev. Stat. §§4283-4289 in respect to loss or damage sustained by the collision (R. 52). Your petitioner (claimant below), Great American Insurance Company, filed claim in the limitation proceeding both on its own behalf, as underwriter on a portion of the cargo lost and damaged on the DENDERAH, and also as assignee of underwriters of other cargo (R. 88) similarly situated.

An amendment to the petition for limitation of liability (R. 169) set forth as a defense *inter alia* (R. 172) that the collision occurred in the territorial waters of the United States of Brazil between a Brazilian vessel and a German vessel; that both Germany and Brazil were at the time parties to a treaty entitled "The International Convention for the unification of certain rules of law in regard to collisions," also known as "The Brussels Convention of September 23, 1910"; that said treaty governed the rights and obligations of the parties; that by said treaty the said nations agreed on behalf of their nationals that where a collision occurred between their seagoing vessels, compensation due for damages caused to their vessels or to any cargo on board thereof should be made in accordance with the provisions of said treaty, and that damages resulting from the collision should be allocated pursuant to the provisions of said treaty; and that by virtue of said treaty, if both vessels were in fault, the liability of each vessel was in proportion to the degree or fault respectively committed.

Exceptions by Great American Insurance Company (R. 208) to the foregoing defense were overruled by the District Court for the Eastern District of New York (R. 210-218; 15 F. Supp. 627).

At the first trial in the District Court it was contended for the owner of the MANDU (respondent here) that Great American Insurance Company, being an assignee with respect to the great portion of the cargo interest, although interested on its own behalf as insurer on certain shipments, had no standing in Court and was not a proper party claimant to the limitation proceeding. This contention was upheld by the District Court, which dismissed the claim of Great American Insurance Company, and allowed the Companhia de Navegacao Lloyd Brasileiro to withdraw its petition for limitation of liability (R. 500; 636-42; 20 F. Supp. 820, 21 F. Supp. 372).

On appeal the Circuit Court of Appeals for the Second Circuit affirmed the order of the District Court holding that the provisions of the Brussels Convention governed the rights and liabilities of the parties and reversed the order of the District Court dismissing the claim of Great American Insurance Company permitting the owner of the MANDU to withdraw its petition, and remanded the cause to the District Court for determination on the merits (R. 738a; 102 F. [2d] 459).

Following a trial on the merits, the District Court held that both vessels were equally at fault for the collision and, applying Art. IV of the Brussels Convention, awarded claimant (petitioner here), Great American Insurance Company, a recovery of 50% of its damages from Companhia de Navegacao Lloyd Brasileiro, owner of the MANDU (R. 2160-71; 1939 A. M. C. 1313, not officially reported).

An appeal was taken to the Circuit Court of Appeals by Companhia de Navegacao Lloyd Brasileiro, urging that the MANDU was without fault and that she should be exonerated from liability. The Circuit Court of Appeals affirmed the holding of fault on the part of both vessels, but on its own motion and without briefs from the interested parties or argument on the question, modi-

fied your petitioner's recovery against the owner of the MANDU by decreasing the award to cargo interests from 50% to 20% of the damages sustained, upon the theory that the faults of the DENDERAH were four times as great as the faults of the MANDU, and that as the Brussels Convention provided for recovery by either ship or cargo only in proportion to the faults of the respective vessels, the Great American Insurance Company could recover only 20% of the cargo damage (R. 2204; 114 F. [2d] 361).

Petitioner herein seeks a review of both decisions of the Circuit Court of Appeals. It first seeks a review of that part of the Court's first decision holding that the Brussels Convention governs the rights and liabilities of the parties as to the rights of recovery. If this Court determines that the Brussels Convention does not govern the rights of cargo claimants, the MANDU having been held at fault, her owner is liable to cargo interests for its full damages and no further questions need be considered. On the other hand, if it be determined that the Brussels Convention governs the rights of innocent cargo just as it does those of the wrongdoing vessels, then your petitioner seeks a review of the Court's second decision as to apportionment of damages other than equally. No question of fact is presented, the issues involved being purely of law.

QUESTIONS PRESENTED.

1. In a petition for limitation of liability brought by a foreign shipowner (Brazilian) in a United States Court, involving a collision between vessels of two foreign countries (Brazil and Germany), does the Brussels Convention govern the admeasurement of damages to the extent of depriving innocent cargo from a full recovery from either of the offending vessels, subject to the right of limitation of liability under the United States statutes?

2. Is it not contrary to the public policy of the United States to allow a foreign subject to seek the refuge of our Courts and the benefit of our protective statutes (limitation of liability statutes), and at the same time obtain the benefit, in certain other respects, of foreign law (Brussels Convention) which is contrary to our own law?

3. Is it not contrary to the public policy of the United States that an innocent party who has suffered damage due to negligence of a joint tort feasor shall be deprived of its right in our courts to recover *in solido* against any one of the joint tort feasors?

4. Assuming the Brussels Convention governs the measure of recovery, did the Circuit Court of Appeals err in apportioning fault between the DENDERAH and the MANDU other than equally?

5. Was the Circuit Court of Appeals justified in making petitioner's recovery only 20% against the owner of the MANDU, instead of 50% as found by the District Court?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The United States has consistently refused to adopt the Brussels Convention which the Court below has held controlling.

2. The decision of the Circuit Court of Appeals is the first and only decision of any Circuit Court of Appeals in the United States holding that the Brussels Convention governs the amount of damages recoverable in a Court of the United States.

3. The decisions of this Court in *La Bourgogne*, 210 U. S. 95, and *The Titanic*, 233 U. S. 718, establish that in proceedings for limitation of liability brought by a foreign vessel owner American law must be applied, both

as to the right and the amount of claimant's recovery. The decision of the court below in applying the Brussels Convention to cut down the amount of petitioner's (cargo claimant's) recovery is contrary thereto. The decision of the court below is also contrary to *Galef* v. *United States*, 25 F. (2d) 134 (E. D. So. Car.).

4. The decision of the court below in apportioning damages other than each vessel bearing 50% of the total damages is contrary to the decision of this Court in *The Atlas*, 93 U. S. 302, and the decision of the Circuit Court of Appeals (3rd Circuit) in the *Margaret-Manchester Merchant*, 30 F. (2d) 923, 928.

5. The questions raised by this petition are of great importance to common carriers of merchandise, underwriters and commercial interests in general.

CONCLUSION.

It is respectfully submitted that this controversy presents important questions never passed upon by this Court, also a serious conflict in the decisions of the Federal Courts, and is of such general concern as to merit a review by this Honorable Court.

FORREST E. SINGLE,
Counsel for Petitioner,
Great American Insurance Company.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and entitled to favorable consideration of the Court, and that it is not filed for the purpose of delay.

FORREST E. SINGLE.

New York, November 15, 1940.